IN THE

Supreme Court of the United States

OCTOBER TERM 1948.

No. 661

IN THE MATTER OF

SOUND, INC., A CORPORATION,

DEBTOR.

ATWELL BUILDING CORPORATION, A CORPORATION,
Petitioner,

vs.

SOUND, INC., A CORPORATION, AND FRED DONENBERG, TRUSTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

VINCENT O'BRIEN,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Atwell Building Corporation, respectfully asks that a writ of certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review a judgment of that court affirming a judgment of the District Court denying the petition of Atwell Building Corporation for possession of real estate.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Sec. 1254(1), approved June 25, 1948, effective September 1, 1948.

The judgment of the Court of Appeals was entered December 22, 1948 (R. 112).

OPINION BELOW.

The opinion of the Circuit Court of Appeals appears in the record at page 109. It is reported in 171 Fed. (2d) 253. The District Court filed no opinion.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Atwell Building Corporation demised premises to Sound, Inc. under a lease which provided that the lease should terminate *ipso facto* upon the filing of any petition in bankruptcy by or against the lessee.

A petition in bankruptcy was filed against the lessee, Sound, Inc., November 8, 1946 (R. 2), which proceedings, on February 17, 1947, were converted to proceedings for reorganization under Chapter X (R. 11, 15).

With knowledge of the pendency of the proceedings, the lessor accepted from Fred Donenberg, originally receiver and later trustee in bankruptcy, payments in the precise amounts set forth in the lease (see exhibits following page 68 of record). Thereafter, on March 27, 1947, Atwell Build-

ing Corporation filed its petition to obtain possession of said premises, setting forth the said provision of the lease and asserting that the lease had automatically terminated by reason of the institution of the bankruptcy proceedings (R. 19, 20).

The trustee in his answer to the petition contended that by reason of its acceptance of said payments without protest the lessor was barred by waiver and estoppel from maintaining its petition (R. 28, 29).

On uncontroverted facts the master in chancery concluded as a matter of law that the lessee by accepting such payments "waived its right to terminate the lease" (R. 74). The lessor's objections to the report were overruled and an order was entered approving the report and denying the lessor's petition (R. 77).

On appeal to the Court of Appeals the judgment was affirmed.

That court held that the provision was for the benefit of the lessor and that, therefore, the lease was terminable only at the lessor's option, and that the acceptance of the payments constituted an election to continue the lease in existence. It held it to be immaterial whether the provision of the lease was a conditional limitation or a condition subsequent.

Since at none of the times in question had there been any attempt by the trustee in bankruptcy to affirm the lease, it is implicit in the decision that such payments were not necessarily and as a matter of law merely for use and occupancy of the premises but, on the contrary, might be deemed to be rent under the lease depending upon the intention of the parties.

QUESTIONS PRESENTED.

It was and is the contention of the petitioner that the lease provision is a conditional limitation and that, accordingly, the lease was automatically terminated when the bankruptcy proceedings were instituted; that the doctrine of waiver and estoppel has to do only with conditions subsequent, in which termination depends upon the election of the lessor, and is thus inapplicable in the case at bar.

Accordingly, it was and is petitioner's contention that there was no lease in existence under which rent as such could have been paid, and that the payments therefore could only have been for use and occupancy.

In any event, it was and is petitioner's contention that pending an election by a bankruptcy trustee under order of court to assume or to reject the lease, all payments made by him are necessarily and as a matter of law merely for use and occupancy of the premises, for if it is considered that the trustee has paid as lessee, then such payments would constitute an assumption of the lease by him which would bar his right subsequently to reject the lease.

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. In holding that the trustee made such payments as lessee (rather than for mere use and occupancy) the Circuit Court of Appeals overlooked the point that under the Bankruptcy Act a trustee cannot affirm a lease without an order of court, and that payments if treated as rent and as if lawful, would necessarily constitute as much an affirmance as the lessor's acceptance. The decision of the Seventh Circuit is, therefore, in direct conflict with the rule announced by the Court of Appeals for the Second Circuit in *In re Walker*, 93 Fed. (2d) 281.

2. In addition, the Court of Appeals has decided an important question of Federal law which has not been, but which should be settled by this Court, namely: whether payments made by a trustee in bankruptcy prior to any election by the trustee to assume the lease can, as a matter of law, be anything more than mere payments for use and occupancy.

3. The Court of Appeals, contrary to the decision of this Court in *Finn* v. *Meighan*, 325 U. S. 300, 65 S. Ct. 1147, refused to enforce the right preserved to lessors in bankruptcy cases by Subsection (b) of Section 110, Title 11 U. S. C. A., and failed to observe the distinction made by that statute between automatic termination provisions and those which give the lessor merely an election to terminate.

WHEREFORE, it is respectfully submitted that this peti-

tion for a writ of certiorari to the Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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VINCENT O'BRIEN,
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Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts are stated in the accompanying petition for a writ of certiorari.

JURISDICTION.

The jurisdiction of the Court is invoked under Title 28, U. S. Code, Section 1254(1), approved June 25, 1948, effective September 1, 1948.

OPINION BELOW.

The opinion of the Court of Appeals is found at record page 109, and is reported in 171 Fed. (2d) 253.

SPECIFICATION OF ERRORS.

If a writ of certiorari is issued, petitioner intends to urge that the Court of Appeals for the Seventh Circuit erred:

1. In holding that there was any lease in existence under which the trustee could pay rent.

2. In holding that such payments made by a trustee in bankruptcy during the period within which he may, under order of court, either adopt or reject the lease, may as a matter of law be for anything other than use and occupancy.

ARGUMENT.

I.

The Decision of the Court of Appeals, That the Payments Were Made by the Trustee for Rent Rather Than for Use and Occupancy, Is Erroneous and in Direct Conflict With the Decisions of the Court of Appeals for the Second Circuit.

As we shall later show, the provision of the lease, being a conditional limitation rather than a condition subsequent, the term ended upon the intervention of the bankruptcy proceedings and, therefore, the doctrine of election or estoppel had no application.

Assuming, however, the provision to be a condition subsequent and the intervention of the bankruptcy proceedings to be a breach, so that the lessor might, at his election, terminate the lease or keep it in effect, nevertheless, the acceptance of the payments made did not manifest an election to waive the breach, regardless of the general rule to the contrary.

When there is a bankruptcy or a receivership the rule is different. The lessor is not at liberty to reenter. For a reasonable time, the court lawfully withholds possession, even in cases in which the term has ended, and its officer thereby becomes liable to pay the fair rental value for use and occupancy. He doesn't pay as lessee, nor does he pay rent under the lease even though the amount fairly to be paid for use and occupancy is identical with that prescribed in the lease. He does not so pay because he cannot, inasmuch as such payment would constitute an affirmance of the lease, on his part, which may not be done without order of

court, for it may later appear that the trustee wishes to exercise the discretion which the statute gives him under court approval to reject the lease. "Payment of rent, as rent under the lease, would be as much an affirmance on his part, if lawful, as would the lessor's acceptance." And if the term has ended, there is no lease in effect under which payment could be made.

In *Model Dairy Co., Inc.* v. *Foltis-Fischer, Inc.*, 67 Fed. (2d) 704 (C. C. A. 2) the court said, at page 707:

> "The receiver does not take over the term, when he goes into possession by the court's order, or before his own election. * * * The court puts him there by its own power; the lessor has nothing to say about it. He must take what compensation the court chooses to give him, or he will get nothing; his acceptance cannot be a recognition of the term—[of one] whom he has no power to exclude."

And in *In re Walker*, 93 Fed. (2d) 281, the same court speaking of such payments said, at page 283:

> "* * * they are not payments of rent, that is of money due under the lease; and unless they are, their acceptance by the lessor does not recognize the continued existence of the term. * * * Such a debtor does not pay as lessee; it may not do so, it is forbidden to affirm the lease without order of the court, and the payment of rent as rent would be as much an affirmance, if lawful, as is the lessor's acceptance."

In *Palmer* v. *Palmer*, 104 Fed. (2d) 161, the same court stated, at page 163:

> "A lease, being property *cum onere*, does not pass to a trustee in bankruptcy, unless he adopts it. * * * the trustee need not pay the rent during the probationary period, and the court will hold off the lessor, and force him to be content with the value of the use and occupation meanwhile, though ordinarily it will fix that at the same amount as the rent. * * *"

Similarly, in *Fleming* v. *Fleming Hotel Co.*, 69 N. J. Eq. 715, 61 Atl. 157, it was held that acceptance of rent from the lessee receiver while he was in possession did not, *since he was bound to pay for the use and occupancy during the time he held the property,* amount to a waiver of the lessor's right of reentry.

In relying on the case of *Moffat Tunnel Improvement Dist.* v. *Denver & S. L. Ry. Co.*, 45 Fed. (2d) 715, the Court of Appeals overlooked the fact, pointed out in our reply brief, that the property in question in that case was not in court custody.

We submit that the Court of Appeals erred in concluding that even in bankruptcy cases "it is all a matter of intention" and that its decision is directly in conflict with the first ground of the holding in *In re Walker*, 93 Fed. (2d) 281 (C. C. A. 2).

II.

In Holding That a Trustee in Such Situation May Pay as Lessee, the Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Which Should Be Settled by This Court.

It is apparent that the question discussed under the foregoing point is one which frequently arises in bankruptcy proceedings. As we have noted, there is a conflict in the decisions of the Courts of Appeals. Even in the decisions of the Second Circuit, the court, as a further reason for its conclusion, inquires into the facts to see whether a waiver existed under the general law. We submit that in bankruptcy or receivership matters the doctrine of waiver through the acceptance of such payments should have no application at all, since the court officer is not free to commit the estate and since he is under an independent duty

to pay rent for his use of the premises pending the time of his election to affirm or to reject the lease.

We have been unable to find any decision of this Court on that important question.

III.

The Decision of the Court of Appeals Is Contrary to a Ruling of This Court, in So Far as the Court of Appeals, in Effect, by Erroneous Application of the Doctrine of Waiver and Election, Refused to Enforce the Right Preserved to Lessors by Express Provision of the Bankruptcy Statutes, and Failed to Observe the Distinction There Made Between Automatic Termination Provisions and Those Which Give the Lessor Merely an Election to Terminate.

In its opinion the Court of Appeals erroneously concluded that it makes no difference whether the provision of the lease was a conditional limitation or a condition subsequent and that, in either case, it was obviously made for the benefit of the lessor, so that if the lessor did not want to treat the lease as terminated, the lease would continue in existence.

Lease termination provisions are of two types. The first type includes those which give the lessor the option to terminate or to forfeit upon the happening of a specified contingency. In the second type the provision is self-executing without need for any affirmative action and termination is, therefore, automatic upon the occurrence of the contingency. See Annotation in 115 A. L. R. 1189, 1191, and 168 A. L. R. 504, 506. These annotations show that the distinction is universally made.

The provision in the instant case is substantially identical with the one set forth in *Irving Trust Co., as trustee* v.

A. W. Perry, Inc., 293 U. S. 307, 311, 79 L. Ed. 379, 382. That case is therefore conclusive on the point. The court said, page 382:

> "By the terms of the contract the filing of the petition in bankruptcy was, of itself, and irrespective of the election of lessor or lessee, a breach of the lease. The claim of the landlord, consequent upon the breach, arose and matured at the moment of the filing of the petition."

The same conclusion was reached by the Supreme Court in respect of a similar lease provision in *Finn* v. *Meighan*, 325 U. S. 300, 65 S. Ct. 1147.

It follows that the effect is the same as if the term prescribed in the lease had expired by lapse of time. There was thus nothing left to pass to the bankrupt's estate. As stated in *Murray Realty Co.* v. *Regal Shoe Co.*, 193 N. E. 164 (N. Y.), page 165:

> "It is easy for the draughtsman of a lease to provide that an adjudication in voluntary bankruptcy shall terminate the lease only if the landlord shall so elect. That is not the language of the lease before us. By a process of judicial construction plain words—'ipso facto end and terminate'—are made to read as if they were a lessor's covenant merely. We are constrained to accept the construction of the trial justice and say that the clause under consideration is a conditional limitation by reason of which the lease expired upon an adjudication that the lessee is bankrupt. Bankruptcy constitutes a breach of the lease. It thereupon ends and terminates, ipso facto."

The latter case makes it particularly clear that the provision is not one "obviously made for the benefit of the lessor", as the Court of Appeals erroneously concluded. It also makes it clear that the term had come to an end just as effectively as if it had expired through lapse of time. Nothing short of a new lease could bind the parties.

It, therefore, follows that the doctrine of election or of estoppel is wholly inapplicable. It also follows that there was in existence no lease under which it could possibly be said that the trustee was paying rent. Accordingly, the payments made by him must, of necessity, be held as a matter of law to have been made for use and occupancy of the premises.

As said in *Jandrew* v. *Bouche,* 29 Fed. (2d) 346, at page 346:

> "Under the above construction the lease terminated with the adjudication in bankruptcy and the appointment of the trustee. Consequently, there was no rent to accrue in the future, and no lien under either the lease or the statute. Of course appellee was entitled to a lien for the rent earned and to be paid by preference at the same rate for the time the premises were occupied by the trustee, as an expense of administration."

The Court of Appeals in this connection relied upon *Schneider* v. *Springmann,* 25 Fed. (2d) 255, 256 (C. C. A. 6). The lease in that case, however, did not contain a conditional limitation. The provision was:

> "Should the lessee become bankrupt or go into involuntary liquidation, then in such event this lease shall become immediately forfeited."

The Sixth Circuit in that case took the view that the provision meant that the lease might be forfeited at the election of the lessor, and pointed out that a provision of that type was for the lessor's benefit, and that the party for whose benefit such a condition was provided generally had an election whether or not to insist upon it. The court further said that "forfeit" and "terminated" were not synonymous and that it would have been easy for the parties to have used "terminated", but that "forfeited" implied an election.

In our case the word is "terminated" and not "forfeited".

Subsection (b) of Section 110, Title 11, U. S. C. A. provides:

> "A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election, and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto, or of either party, shall terminate the lease, or give the other party an election to terminate the lease, shall be enforceable."

This court in *Finn* v. *Meighan*, 325 U. S. 300, 65 S. Ct. 1147, in considering this section of the act, held, at page 1149, that the above provision of the act is merely declaratory of the law as it existed and that such provision is applicable in reorganization proceedings.

This section of the Bankruptcy Act makes a distinction between conditional limitation and condition subsequent provisions which the Court of Appeals in the instant case failed to observe. In so doing, it deprived the lessor of a right preserved to it by the Bankruptcy Act itself.

Conclusion.

It is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

VINCENT O'BRIEN,
Attorney for Petitioner.

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Respondents.

BRIEF OF RESPONDENT, SOUND, INC., DEBTOR, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS OF COURT BELOW.

On January 23rd, 1948, after notice to all counsel of record, the Special Master to whom the matter was referred, after hearings and consideration of the evidence, documentary and oral, rendered his written report to the Court (R. 70 to 77, incl.). His findings of fact and conclusions of law (R. 72-74) recommended the dismissal of Atwell Building Corporation's Petition for Possession of Leased Premises.

No written objections were filed by Counsel for Atwell, under Rule 53 E(1-2) of Federal Rules of Civil Procedure.

The District Court, on February 6th, 1948, took the Master's Report and Atwell's oral objections thereto, the nature of which do not appear of record under advisement (R. 77), and on February 9th, 1948, the Court confirmed the Master's Report and overruled Atwell's oral objections thereto (R. 77).

The Circuit Court of Appeals for the Seventh Circuit affirmed the Decision of the District Court dismissing Atwell's Petition. No petition was filed by Atwell for rehearing and the Court's mandate was issued and filed in the District Court January 13th, 1949 affirming the decree of the District Court dismissing Atwell's Petition for Possession of the Leased Premises, with costs. The Court's opinion (R. 109) is reported in 171 Fed. (2d) 253.

JURISDICTION.

Petitioner does not show any Jurisdictional Grounds for a review on a Writ of Certiorari in that Counsel fail to show:

(a) That the decision of the Court of Appeals is in conflict with the decision of another Circuit Court of Appeals on the same matter;

(b) That the decision in this case is in conflict with the decisions of this Court on the same subject matter;

(c) No showing of public interest has been made. This litigation is between private citizens of the State of Illinois and involves purely contractual rights. The legal principles involved have long been settled by the Courts of this State. The Federal cases on the same subject uniformly follow the Rules of Decision of the Courts of this and other States.

RESPONDENT'S STATEMENT OF THE CASE.

Petitioner's statement of the case is not correct and is an unfair presentment of the facts.

The summary of the facts as stated by the Circuit Court of Appeals (R. 109) is a correct statement and affirms the findings of the Master (R. 70-74), as confirmed by the lower Court (R. 77).

Petitioner, Atwell Building Corporation (hereinafter sometimes referred to as "Atwell"), leased to Respondent, Sound, Inc. (hereinafter sometimes referred to as "Sound"), the Eighth Floor of its building, located in Chicago, for light manufacturing purposes, for the term commencing October 1st, 1945 and ending September 30th, 1950 (Ex. "B", R. 22).

The Lease contained the following pertinent provision:

> "Third:—That in order more effectually to secure to the lessor the payment of rent and the performance of all other covenants herein contained, it is agreed as an additional condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the lessee shall constitute a breach of this lease and thereupon *ipso facto*, and without entry or other action by the lessor, this lease shall terminate and notwithstanding any other provisions of this lease the lessor immediately upon said termination and without action or notice, shall be entitled to recover as liquidated damages for such breach an amount equal to the amount of the rent reserved in this lease for the unexpired portion of the term thereof, plus the estimated cost of obtaining a new tenant for the demised premises, less the fair rental value of the premises for said unexpired portion of said term."

On November 8th, 1946, an involuntary petition in bankruptcy was filed against Sound, Inc., but no adjudication in bankruptcy has been entered. On February 28th, 1947, Sound filed its Petition in the bankruptcy proceeding for reorganization under Chapter X and Fred Donenberg was appointed Trustee.

Counsel for Atwell concede that soon after the filing of the Petition for adjudication against Sound, the President of Atwell learned of the pendency of the bankruptcy proceeding (R. 42) but nevertheless being aware of its pendency, Atwell billed Sound for rent in accordance with the terms of the lease for the months of December, 1946 and January, 1947. See Trustee and Sound Ex. 2 a-b-c and d and 7 a-b-c and d, R. 68 and following pages.

Sound paid Atwell's bills as rent and the payments were accepted as rent by Atwell. Findings, based on these exhibits and oral evidence (R. 42, 43, 55, 56, 57, 67) were made by the Master, confirmed by the District Court and affirmed by the Court of Appeals.

From February, 1947 to and including August, 1947, Atwell billed Sound for use of the leased premises but payments were made as rent, and as found by the Master and confirmed by the Court (R. 73, 74, 77), were accepted by Atwell as rent.

This practice continued until January, 1948, when Atwell again changed and billed Sound as rent and all rent stands paid as rent to and including March, 1949.. The monthly payments of rent made from August, 1947 to and including March, 1949 are not shown in the record, but we believe counsel for Atwell will, as he did in the Court of Appeals, concede that these payments have been made.

Atwell at no time during Donenberg's Trusteeship billed him for rent or for use of the premises. Statements in each month were billed in the name of Sound, Inc.

Sound's Answer (R. 24) to Atwell's Petition for Possession set forth the defense that Atwell's acceptance of rent with knowledge of Sound's bankruptcy and its subsequent conduct constituted as a matter of law a waiver of the provisions of paragraph 3 of said lease.

This defense and the substantial evidence offered and received in evidence, as found by the Master, confirmed by the lower courts, constitute the crux of the whole controversy.

The bankruptcy proceeding was instituted November 8, 1946 (R. 2). Sound's Petition to Reorganize was filed February 17, 1947 (R. 11) and approved by the Court February 28, 1947 (R. 15). On March 3, 1948, a Joint Plan for the Reorganization of Sound was filed in this proceeding (R. 81), and a hearing thereon was set for April 23, 1948, notice of which was given to all of Sound's creditors, including Atwell.

This Plan (R. 81) included a provision for the confirmation of Atwell's lease and further provided that the court's decree confirming the Plan would include adequate provisions for the protection of lessor's interest under said lease as shall be determined by the court to be just and equitable.

On March 5, 1948 (R. 82), Donenberg, Trustee, filed his written declaration confirming said lease. No objection was made by Atwell to the filing of the Joint Plan nor to the form of Donenberg's declaration confirming the lease (R. 82). In the orderly course of procedure, the matter came on to be heard on April 23rd, 1948, no objections being filed by any party in interest, including Atwell. Upon hearing, the court, by appropriate order, approved the Joint Plan and set a hearing to consider the confirmation thereof on May 25th, 1948.

Again, in the orderly course of procedure, after due notice to all creditors, including Atwell, the Plan, as ap-

proved by the court, came on to be heard, and upon hearing, was confirmed by appropriate decree, and, again, Atwell made no objection. The decree included appropriate provisions that Donenberg, Trustee, should, on June 15, 1948, turn back to Sound, Inc., the Debtor, all of its property and assets pursuant to the Joint Plan, as approved and confirmed by the court, and, accordingly, on said date, Donenberg, Trustee, by appropriate bills of sale and assignments, returned to Sound, Inc. all of its property and assets, including all of its right, title and interest in and to the Atwell lease. Again, with full knowledge of the proceedings, Atwell made no objection or protest.

Subsequently, on November 1st, 1948, Donenberg, as Trustee of Sound in the reorganization, filed his Final Report and Account as such Trustee, which Report and Account was approved by the court and he was discharged. Therefore he has no further interest in the proceeding.

REASONS FOR DENIAL OF THE WRIT.

I.

Under Rule 38(5) of this Court and the principle set forth in *Magnum* v. *Coty,* 262 U. S. 159, this Court, in the exercise of its sound judicial discretion, should, under the facts and the law applicable to this case, deny Petitioner a review on certiorari.

II.

The Master, the District Court and the Court of Appeals were correct in deciding that Atwell, by the billing and acceptance of rent, with full knowledge of Sound's bankruptcy, waived the breach under paragraph 3 of the lease and that the lease was not *ipso facto* terminated on Sound's bankruptcy and thereby rendered "Void." The lease was only rendered "Voidable" at Atwell's election and it chose to waive the breach.

III.

A condition in a lease once waived by the lessor with full knowledge that grounds for termination had occurred, he will not be heard to say thereafter that the lease was terminated.

IV.

Under all the authorities, the question whether Atwell waived the breach of the lease with knowledge of Sound's bankruptcy was a question of fact, and the Master found that Atwell, having billed and accepted rent from Sound, with knowledge of such bankruptcy, constituted a waiver of such breach and the Master's findings (R. 73), based

upon substantial evidence and adopted by the District Court and affirmed by the Court of Appeals, should not be set aside, unless clearly erroneous.

V.

Atwell, by its conduct, is estopped from asserting that the lease is not now in force, and, under the facts and circumstances of this case, the question has become moot.

VI.

A Court of bankruptcy is a Court of Equity and this proceeding in Equity calls for the application of Equitable Principles.

VII.

Our answer to Contentions of Counsel for Atwell and cases cited by him.

ARGUMENT.

I.

Under Rule 38 (5) of This Court and the Principle Set Forth in Magnum v. Coty, 262 U. S. 159, This Court in the Exercise of Its Sound Judicial Discretion, Should, Under the Facts and the Law Applicable to This Case, Deny Petitioner a Review on Certiorari.

Under Rule 38(5) of this Court, in light of this Court's interpretation of the rule, as stated in *Magnum* v. *Coty*, 262 U. S. 159, 67 L. Ed. 922, this Court should deny Petitioner a review on Certiorari.

In the *Magnum* case, at page 163, this court said:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes; first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Moreover, under Title 28 U. S. C. A., Sec. 725, and cases cited, the rule of this case is controlled by the decisions of this State and no Federal question is really involved.

Sec. 725 provides:

> "Laws of States as Rules of Decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise

> require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply (R. S. & 721)."

And in *Title Ins. & Trust Co.* v. *Hisey,* 95 Fed. (2d) 555, the court recognized the principle that Federal courts should take cognizance of the state law upon questions of this character. The court said at page 561:

> "The California courts have settled beyond a peradventure of a doubt that 'the acceptance of rent by the landlord from the tenant, after the breach of a condition of a lease, with full knowledge of all the facts, is a waiver of the breach, and precludes the landlord from declaring a forfeiture of the lease by reason of said breach' (citing cases)."

However, as will be seen from a review of the cases cited and discussed under our proposition II the Federal Courts have uniformly followed the Rules of Decisions of the State Courts on the question involved in this case.

II.

The Master, the District Court and the Court of Appeals Were Correct in Deciding That Atwell, by the Billing and Acceptance of Rent, with Full Knowledge of Sound's Bankruptcy, Waived the Breach Under Paragraph 3 of the Lease and That the Lease Was Not Ipso Facto Terminated on Sound's Bankruptcy and Thereby Rendered "Void." The Lease Was Only Rendered "Voidable" at Atwell's Election and It Chose to Waive the Breach.

Counsel also concede that Atwell, with knowledge of Sound's bankruptcy, billed Sound for rent and accepted monthly payments as rent.

The Circuit Court of Appeals cites the case of

Moffat Tunnel Improvement Dist. v. *Denver & S. L. Ry. Co.*, 45 Fed. (2nd) 715, 730; in support of its holding that as paragraph 3 of the lease was for the sole benefit of Atwell, it had the right on Sound's bankruptcy to waive the breach, acknowledge the continued existence of the lease, and that having done so, the Master and District Court were right in finding, based upon substantial evidence, that Atwell was thereafter bound by its course of conduct. In the *Moffat* case, the Circuit Court of Appeals for the Tenth Circuit (pp. 30, 31) said:

> "Other *amici curiae* contend that the contract is illegal because the railway is not bound for the full term, in that by Section 9 of the lease, *the lease is terminated without notice* and the lessor may re-enter if there is a default in the payment of rental for a year or more. *Such provisions are familiar in leases and contracts of sale, and are uniformly held to be for the benefit of the lessor or vendor and may be waived by him.* The contention that a party to a contract may relieve itself of liability by default in its own obligations thereunder, is unusual but not unprecedented. A similar contention was made in *Stewart* v. *Griffith*, 217 U. S. 323, 30 S. Ct. 528, 529, 54 L. Ed. 782, 19 Ann. Cas. 639, where the language was even stronger, the contract there providing that in case of default, the down payment 'is to be forfeited and the contract of sale and conveyance to be null and void and of no effect in law.' There was a default and the seller brought an action for the balance of the price, and the buyer contended that by forfeiting the down payment, he was relieved of further liability, because the contract was then null and void. But the Supreme Court held otherwise saying:
>
> " 'The condition plainly is for the benefit of the vendor, *and hardly less plainly for his benefit alone*, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the *word*

> *"void" means* voidable at the vendor's election, and the condition may be insisted upon or waived, at his choice (citing cases)' " (Italics ours).

The Court of Appeals also cites *Schneider* v. *Springmann*, 25 Fed. (2nd) 255, 256, wherein the Court of Appeals for the Sixth Circuit (pp. 255) said:

> "(1,2) Two considerations lead us to agree with the District Judge. One is that ordinarily the party for whose benefit a condition is provided has an election whether or not to insist upon the condition; *and this principle applies to leases as well as to other contracts.* 'Leases which * * * declare that on the happening of the contingency the demise shall thereupon become *null and void (mean) that the forfeiture may be enforced * * * at the option* of the lessor.' *Ewell* v. *Dagg*, 108 U. S. 143, 149, 2 S. Ct. 408, 412 (27 L. Ed. 682). See, also, Taylor's Landlord and Tenant (8th Ed.) & 492" (Italics ours).

To the same effect is *Montello Brick Works*, 163 Fed. 624, and affirmed by the Circuit Court of Appeals, 167 Fed. 482.

Here it is to be noted that the Court in the *Moffat* case, *supra*, cites the case of *Stewart* v. *Griffith* (*supra*) decided by this Court.

In the *Stewart* case, Justice Oliver Wendell Holmes wrote the opinion concluding that the forfeiture provision was plainly for the benefit of the vendor alone. That the vendor had the right to call for strict performance which he chose not to do. Thus, as a matter of law, as applied to our case, the word "Void" means "Voidable" at lessor's option and that the condition may be insisted upon or waived at lessor's choice.

Another case in point decided by this court and also cited in the *Moffat* case is *Knickerbacker L. Ins. Co.* v. *Morton*, 96 U. S. 234, 24 L. Ed. 689.

This Court, in an able opinion by Justice Bradley, page 692, said:

* * * * *

"Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, *and equity in all cases,* discharges the forfeiture, upon such compensation being made.

* * * * *

"The case of leases is not without analogy to the present. It is familiar law, that, when a lease has become forfeited, any act of the landlord indicating a recognition of its continuance, such as distraining for rent, *or accepting rent which accrued after the forfeiture, is deemed a waiver of the condition* (citing cases).

* * * * *

"And then the learned Judge cites authorities, going back to the Year Books, to show that a determination of a man's election in such cases may be made by express words, or by act; and that if, by word or by act, he determines that the lease shall continue in existence, and communicates that determination to the other party, he has elected that the other shall go on as tenant.

* * * * *

"These cases show the readiness with which courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture" (Italics ours).

Therefore, contrary to the contention of Counsel for Atwell, this Court has decided the principle involved in this case, *i.e.*, that the acceptance of rent with knowledge of an absolute cause for forfeiture is a waiver of the condition.

Provisions similar to paragraph 3 of Atwell's lease are familiar in leases and have been uniformly held to be for the sole benefit of the lessor and thus may be waived by

him. There are no cases to the contrary and counsel for Atwell do not cite any. The Circuit Court of Appeals in our case also cite *Model Dairy* v. *Foltis-Fischer*, 67 Fed. (2nd) 704, wherein the Circuit Court of Appeals for the Second Circuit recognize this rule in stating that the lessor's election not to exercise the right of re-entry on the bankruptcy of the lessee is final and may be inferred from receipt of rent accruing after the breach, and at page 706, said:

> "Though delay as such is immaterial, if the lessor elects not to re-enter his decision is final; *it will be inferred from the receipt of rent accruing after the breach, or from any other recognition of the continuance of the term.* Greene's Case, 1 Leonard 262; Green's Case Croke's Eliz. 3; Pennant's Case, 3 Coke, 64(b); *Goodright* v. *Davids*, 2 Cowp. 803; *Roe* v. *Harrison*, 2 Term Rep. 425; Courts have been at times astute to find that the lessor has so elected (Italics ours).

and at page 707, continuing, said:

> "* * * The question of 'estoppel' is closely related to what we have just said. Indeed, it is hard to find more in it than election; because, if the lessor's conduct once indicates an election not to pursue his remedy, he may not pursue it, whether the lessee has acted in reliance on it or not."

And *In re Walker*, 93 Fed. (2d) 281, 283, 346, the court in effect said that although the debtor, as trustee, was not authorized to pay any rent, if the lessors in fact received the payments as rent, it would toll their re-entry. All the Federal decisions we have been able to find follow the rule as laid down by the Supreme Court of this state and the courts of last resort of other states in holding that provisions similar to paragraph third of Atwell's lease do not render the lease void upon lessee's bankruptcy but only voidable at lessor's election. The leading case in

Illinois which has been cited with approval in many other cases is *Webster* v. *Nichols,* 104 Ill. 160. The court, at page 171, in holding that a provision in the lease against the assignment of lessee's interest to be for the sole benefit of the lessor and that the receipt of rent subsequently accruing from the tenant, knowing of a cause of forfeiture, is a waiver of such forfeiture, said:

> "The clause in the lease providing that the premises shall not be assigned without the written consent of the lessors, is *clearly for the benefit of the lessors only.* It does not render the assignment *when otherwise made, absolutely void,* but *voidable only,* at the option of the lessors or their representatives. * * * '*any act done by a landlord knowing of a cause of forfeiture by his tenant, affirming the existence of the lease, and recognizing the lessee as his tenant, is a waiver of such forfeiture* (1 Williams' Saunders, 287; 2 Platt on Leases, 471; 1 Washburn on Real Property, 454). *The receipt of rent subsequently accruing* from the tenant by the landlord is such an act, and the forfeiture thereby waived (*Bleeker* v. *Smith,* 13 Wend. 530; *Jackson* v. *Allen,* 3 Cow. 220, and authorities cited by Sutherland, J. 230).' *Ireland* v. *Nichols,* 46 N. Y. 416. See also, *Shattuck* v. *Lovejoy,* 8 Gray 204; *Fisher* v. *Deering,* 60 Ill. 114 (Italics ours)."

And in *Waukegan Times Theatre Corporation* v. *Conrad,* 324 Ill. App. 622 (1945), our Appellate Court in following the rule laid down in *Webster* v. *Nichols, supra,* said at page 632:

> "This well recognized rule has its foundation, at least in part, upon the fundamental rule, that one having the exclusive right to terminate an executory contract, must abrogate it altogether, if at all. He cannot be heard to say it is valid for one purpose, and, in the same breath, that it is invalid for all other purposes, but is founded chiefly upon the principle of *common honesty and natural justice, which the law*

exacts of mankind in their intercourse and dealings with each other (*Schimp* v. *Cedar Rapids Ins. Co.*, 124 Ill. 354, 357). In the case at bar, as in *Webster* v. *Nichols, supra,* appellants are attempting to enforce rights under an assignment, by seeking to recover for the unpaid fuel oil bill, under the terms of the lease, and in addition to accepting the rent from the several assignees, including appellee, they accepted rent from appellee, without protest or condition, for the month of September, 1938, *after they had notice of the bankruptcy of Silverman.* Under the doctrine laid down in *Webster* v. *Nichols, supra,* this was also a waiver of forfeiture on account of such bankruptcy."

To the same effect are the following Illinois cases: *Willoughby* v. *Lawrence,* 116 Ill. 11, 12; *Sexton* v. *Chicago Cold Storage Co.,* 129 Ill. 318, 322; *Smith* v. *Goodman,* 149 Ill. 75, 84; *Weece* v. *Grant,* 337 Ill. 21, 22; *Donovan* v. *Murphy,* 217 Ill. App. 31, 36, and many others could be cited but none to the contrary.

This rule has been settled by the great weight of authorities, if not by all, as will be seen by a review of the decisions of the Courts of last resort of other states.

In the case of *Morrison* v. *Smith,* 44 Atl. Rep. 1031, 1032, the Supreme Court of Maryland said:

"The ordinary waiver of forfeiture occurs by an acceptance of rent which became due after a breach committed by the tenant. Tayl. Landl. & Ten. (7th Ed.) Sec. 497. This seems to be the well recognized rule of law on the subject, settled by the great weight of authorities, if not by all. * * * We hold that upon a proper construction of the lease, considering all its terms and provisions, with the view of arriving at the intention of the parties, it was *voidable only upon a breach of the covenant by the lessee, at the election of the lessor, and not absolutely void, as contended for by the appellant;*" (Italics ours).

And in *Bowman* v. *Foot*, 29 Conn. 331, the Supreme Court of Connecticut said, page 337:

"High authority sanctions the idea that the acceptance of rent accruing after condition broken, is in law a waiver of the forfeiture, and not evidence of such waiver merely. It has also been said by judges of eminence, that the right of the party who pays money to control its application, constrains the lessor who receives rent, tendered as such, to waive his claim of forfeiture. The only point which we propose to settle as the law of the present case is, that, upon the facts stated, there was no legal determination of the lessee's estate. * * *

"One of these covenants was for the payment of a quarterly rent upon certain quarter-days named. In a subsequent part of the instrument is a proviso of the following tenor: 'Provided, however, that if the lessee neglects to pay the rent, etc., then this lease shall thereupon, by virtue of this express stipulation therein, expire and terminate, and the party of the first part may, at any time thereafter, re-enter said premises, and the same have and possess as of his former estate.'

* * * * *

page 338.

"It was the clear intent of the parties, whatever they may have supposed to be the legal consequences in detail of such a stipulation, to attach to the demise a *condition for the lessor's benefit*, upon the breach of which he was authorized to compel the tenant to submit to a forfeiture of his tenancy.

"The legal interpretation of the instrument agrees with this manifest intent. There is no peculiar significance to the words *'shall expire and terminate'*. They mean just as much, and *just as little*, as would the *more common phrase, 'shall become void,'* if inserted at the same place. Indeed it appears that both terms were employed together in a lease, the construction of which was the subject of determination in the case of *Jackson* v. *Harrison*, 17 Johns 66. It was there provided that in case the rent should not

be paid 'it should be lawful for the lessor to re-enter,' etc. and that 'the lease and estate thereby granted should cease, determine and become *utterly void,* if the lessor should elect so to consider it.' It is well understood that such expressions as these in leases for years do not designate the non-payment of rent as an event, like a death or a marriage, at the date of which an estate shall cease at all events. If so, it would be in the power of the tenant, whenever his leasehold property became unprofitable or onerous, to relieve himself, at any pay-day, of his duty to retain it, by simply violating his own covenants. Such a construction would be a plain perversion of the intent of the parties. Accordingly, such stipulations are now universally taken to be for the advantage of the landlord. *'Void' means 'voidable at his election.' Jones* v. *Carter,* 15 Mees. & Wels., 718. 'Expire and terminate' *is also an elliptical phrase meaning 'expire and terminate at the lessor's option.'* This principle of construction leaves us nothing to do with a distinction, which is said to prevail between freehold interests and leases for years, requiring in one case, and not requiring in the other, an entry or claim to divest an estate wholly void by the breach of a condition. In cases like the present, the estate is not wholly void by reason of a breach. Compare Shep. Touch., pages 139 and 194. See also *Doe* v. *Bancks,* 4 B. & Ald. 401. To ascertain the law of the case in hand, we must fill up the ellipsis. The lease is to expire and terminate after non-payment, at the option of the lessor, who may then re-enter and annul the tenancy.

"This rendering of the contract makes the duration of the lease contingent on the exercise by the lessor of his right to terminate it. To denote how this is to be done, the instrument, fairly read, implies that a re-entry shall take place; the usual technical mode prescribed in such contracts, *indicating, in the case of estates, less than freehold, not necessarily a literal entry, but some proceeding that should in a significant and decisive manner declare the forfeiture of the lease and assert the landlord's rights"* (Italics ours).

Thus, it clearly appears from the rule laid down in the aforementioned cases, as applied to leaseholds, that an *ipso facto* termination of forfeiture clause which renders a lease void on breach thereof may be waived by the lessor, as the word "void" means voidable, and that "expire and terminate" mean expire and terminate at lessor's election, and that, as the Circuit Court of Appeals said in our case, the cases turn upon the conduct and intention of the lessor with reference to his rights under the lease after knowledge that a breach has occurred, and, therefore, if Atwell did not want to treat the lease as terminated, it had a right to do so.

Here it is to be especially noted that Atwell did not avail itself of its right reserved in the aforementioned paragraph 3 of said lease to file a claim in Sound's bankruptcy for rent accruing after the date of bankruptcy. As a matter of fact, this was not necessary, as it has received since the date of Sound's bankruptcy all the monthly payments of rent from Sound and has accepted same. Hence no injury.

The Court of Appeals further said that based upon the facts of our case established by substantial evidence as found by the Master and confirmed by the District Court, it makes no difference to a court of bankruptcy, which is in effect a court of equity, (paragraph 3) whether the provision of the lease is termed a conditional limitation or a condition subsequent. It provides for termination or forfeiture upon breach of paragraph 3, and as we have seen from a reading of the cases means "At Lessor's Option." Therefore, regardless of what the provision is called, it being strictly for the benefit of the lessor, under all the authorities, may be taken advantage of only by him and him alone therefore, if he chooses, he may waive it, which he did.

Here it is to be especially noted that Counsel for Atwell does not answer the Court of Appeals decision to the effect

that it makes no difference whether paragraph 3 of the lease is termed a conditional limitation or condition subsequent. Atwell certainly was the only one that had the right of re-entry for condition broken and, hence, there appears to be no logical reason why it could not, if it chose, waive the breach which the lower courts held it did. We will show, under our Answer to Contentions of Counsel for Atwell (XII), page 26 hereof, that the distinctions between conditions and limitations are extremely subtle and artificial, Kent's Commentaries, 14th Ed., page 133.

III.

A Condition in a Lease Once Waived by the Lessor With Full Knowledge That Grounds for Termination Had Occurred, He Will Not Be Heard to Say Thereafter That the Lease Was Terminated.

It was established by substantial evidence and found by the Master and confirmed by the lower courts that Atwell by the acceptance of rent waived the breach of the lease with knowledge of Sound's bankruptcy and as a matter of law was therefore estopped from contending that the lease was terminated by the institution of bankruptcy proceedings.

As was said in *Model Dairy Co.* v. *Foltis-Fischer, supra,* at page 707:

> "* * * The question of 'estoppel' is closely related to what we have just said. Indeed, it is hard to find more in it than election; because if the lessor's conduct once indicates an election not to pursue his remedy, he may not pursue it, whether the lessee has acted in reliance on it or not."

Also, our Appellate Court, in the case of *Waukegan Times Theatre Corporation* v. *Conrad, supra,* said:

> "A condition once waived is forever gone."

And the Court of Appeals so held (R. 110, 111):

> "Since the appellant did not treat the lease as terminated, although it had full knowledge that the grounds for termination had occurred, it will not be heard to say afterwards that the lease had been terminated."

IV.

Under All the Authorities, the Question Whether Atwell Waived the Breach of the Lease With Knowledge of Sound's Bankruptcy Was a Question of Fact, and the Master Found That Atwell, Having Billed and Accepted Rent from Sound, With Knowledge of Such Bankruptcy, Constituted a Waiver of Such Breach and the Master's Findings (R. 73), Based Upon Substantial Evidence and Adopted by the District Court and Affirmed by the Court of Appeals, Should Not Be Set Aside, Unless Clearly Erroneous.

The courts have uniformly held that whether there was a breach of a lease with knowledge of the cause of forfeiture, is a question of fact and whether there is a waiver in a particular case is largely a matter of intention. To this effect, *Shannon* v. *Jacobson,* Mass. 160 N. E. 245; *Grant* v. *White,* 42 Mos. 285; *U. S. Trust Co.* v. *Schaeffer,* 542 N. Y. S. 2d 530; *Sproul* v. *Help Yourself Store Co.,* (1926; C. C. A. 3d) 16 F. (2d) 554; *Adams* v. *Ore Knob Copper Co.,* 7 Fed. Rep. 634, 639; *Medinah Temple Company* v. *Currey,* 162 Ill. 441, 445.

The Master found, based upon substantial evidence, oral and documentary (R. 42, 43, 55, 56, 57, 68, and Sound's Ex's. 1 to 10, inclusive), that Atwell, with knowledge of Sound's bankruptcy, waived the breach by acceptance of rent, and his findings were adopted by the District Court

(R. 77) and approved by the Circuit Court of Appeals (R. 111), wherein the Court said:

> "When the event upon which the termination was to take place happened, a breach of the lease occurred. The appellant had a right, since the provision was for its benefit, to do one of two things—stand on the breach and treat the lease as terminated, or ignore the breach and acknowledge the continued existence of the lease. Having done the latter, as the court found upon substantial evidence, the appellant is bound by its course of conduct."

V.

Atwell, by Its Conduct, Is Estopped from Asserting That the Lease Is Not in Force, and, Under the Facts and Circumstances of This Case, the Question Has Become Moot.

The bankruptcy proceeding was instituted November 8, 1946 (R. 2). Sound's petition to reorganize was filed and approved February 28, 1947 (R. 15). On March 3, 1948 a Joint Plan for the Reorganization of Sound was filed in this proceeding (R. 81) and a hearing thereon was set for April 23, 1948, notice of which was given to all of Sound's creditors, including Atwell. This plan (R. 81) included a provision for the confirmation of Atwell's lease and further provided that the court's decree confirming the Plan would include adequate provisions for the protection of lessor's interest under said lease as shall be determined by the court to be just and equitable. Immediately, (R. 82) on March 5, 1948, Donenberg, Trustee, filed his written declaration confirming said lease. No objection was made by Atwell to the filing of the Plan nor to the form of Donenberg's declaration confirming the lease (R. 82). In the orderly course of procedure the matter came on to be heard on April 23rd, no objections being filed by any party in interest, including Atwell, upon hearing the court by

appropriate order approved the Plan and set a hearing to consider the confirmation thereof on May 25th. Again in the orderly course of procedure, after due notice to all creditors, including Atwell, the Plan as approved by the court came on to be heard and upon hearing was confirmed by appropriate decree and again Atwell made no objection. The decree included appropriate provisions that Donenberg, Trustee, should on June 15, 1948, turn back to Sound, Inc., the Debtor, all of its property and assets pursuant to the Plan as approved and confirmed by the court and accordingly on said date, Donenberg, Trustee, by appropriate bills of sale and assignments returned to Sound, Inc. all of its property and assets, including all of its right, title and interest in and to the Atwell lease. Donenberg has since filed his Final Report and Account, which has been approved by the Court, and has been discharged as Trustee and, therefore, has no further interest in the proceeding.

Here it is to be particularly noted that from November 1946 to the present time Atwell has received its rent each month, all of which was paid as rent and received by it as such. Therefore having suffered no injury and at the same time seeking the aid of this court to oust Sound of the possession of the leased premises does not come with good grace.

Under all the circumstances the question has become moot.

The only case we have been able to find wherein a parallel situation existed is *Woodworth* v. *Harding*, 75 (App. Div.) N. Y. 54, 59.

The court in discussing the relative rights of a lessor and lessee after the lessee's receiver had returned all of the property and assets belonging to the lessee, including the lessee's interest in the leasehold, said:

The receiver represented Harding as well as his

> creditors. The receiver held the property subject to the order of the court, and was finally ordered apparently to return it to Harding. *He held the leased premises as well as the assets located therein, and when he returned the property to Harding he returned his interest in the lease with it.* Harding could insist as against the plaintiffs that his rights under the lease had not been taken from him by the bankruptcy proceedings, which had terminated in a return of the property and building to him. And the plaintiffs could insist that their rights in the lease against Harding had not been taken away by the appointment of the receiver, the taking possession of the property by him, the holding possession until the termination of the proceedings and the returning of the property and the leased building to Harding. (Italics ours.)

Under this authority the effect of Donenberg returning all of Sound's property and assets, including the Atwell lease hold estate placed Atwell and Sound in the same position they were in prior to the time the petition in bankruptcy was filed with the lease binding on both parties.

We submit that the question thus brought to this court by Atwell has become moot.

VI.

A Court of Bankruptcy Is a Court of Equity and This Proceeding in Equity Calls for the Application of Equitable Principles.

What motive could Atwell have in wanting to oust Sound from possession of the leased premises, when lessor must admit that all rental payments have been made to date, and there is no evidence that future rentals will not be met. An examination of the lease discloses a possible reason. Ordinarily, rent during the term of the lease increases, but for some reason not of record here, the rent

was to be reduced (R. 20, Ex. b) which provides rental payments for the full term of five years as follows:

> Nine (9) payments at Two Thousand One Hundred Eighty-five and no/100 Dollars ($2,185.00).
> Fifty (50) payments at One Thousand Seven Hundred Sixty and no/100 Dollars ($1,760.00).
> One (1) payment of One Thousand Six Hundred Eighty-five and no/100 Dollars ($1,685.00).

It is common knowledge and the court may take judicial notice of the fact that there is and has been for the past several years acute shortage of improved real estate, including commercial and industrial space. This has brought about an unprecedented demand. Possibly a special offer for Sound's space. Thus to regain possession of the demised premises would enable Atwell to relet the premises at greatly increased rent. This seems the only possible motive and if it succeeds, Sound is hopelessly without a home, because there is just no place for it to go.

But we are in a court of equity and must bear in mind the application of equitable principles as was said in *Waukegan Times Theatre Corporation* v. *Conrad, supra,* page 639:

> "The court said the only conceivable benefit which a forfeiture would confer upon the landlords was that they might, if relieved of the present tenants, be able to lease the premises at a higher rental, a consideration which should not commend itself to a court of equity."

And *In Re Larkey,* 214 Fed. 867, 871, the court said:

> "I think the clear effect of these decisions is that the bankruptcy court may dispose of matters which come before it, upon equitable principles, when justice and equity require that it should do so. While many cases might arise in which it would be considered equitable to enforce, against a bankrupt's estate, a surrender of leased premises for breach of covenants, with a right of re-entry, because the landlord could not proceed to

> enforce his legal right in any other court, still the bankruptcy court may properly refuse such relief when it would be inequitable to grant it. To hold otherwise would be to deny the right to apply equitable principles in proceedings which are in equity."

This is a proceeding in equity and applying equitable principles under all the facts and circumstances of the case this court should follow the ruling of the lower courts.

VII.

Our Answer to Contentions of Counsel for Atwell and Cases Cited by Him.

Counsel for Atwell contends that paragraph 3 of the lease should be construed as a conditional limitation and that by reason thereof, regardless of Atwell's subsequent conduct with knowledge of Sound's bankruptcy, the lease was automatically terminated upon institution of bankruptcy proceedings and that the doctrine of waiver and estoppel has only to do with conditions subsequent.

We do not concede that this provision created truly a conditional limitation, as was said by the author in American Jurisprudence, Vol. 19, page 488, Sec. 28:

> "The true conditional limitation exists where property goes over to a third person upon defeasance instead of reverting to the creator."

But as the Circuit Court of Appeals said (R. 110):

> "We think that it makes no difference to a court of bankruptcy, which in effect is a court of equity, whether the provision of the lease was a conditional limitation or a condition subsequent. It was obviously made for the benefit of the lessor (*Moffat Tunnel Improvement Dist.* v. *Denver & S. L. Ry. Co.*, 45 F. 2d 715, 730; *Schneider* v. *Springmann*, 25 F. 2d 255, 256) and if the lessor did not want to treat the lease as terminated, it

had a right to do so. Since the appellant did not treat the lease as terminated, although it had full knowledge that the grounds for termination had occurred, it will not be heard to say afterwards that the lease had been terminated."

We believe no useful purpose would be served to discuss the distinction between a conditional limitation and a condition subsequent as the distinction is extremely subtle and artificial and has no application to the facts of our case, which involves a leasehold, with the sole right of re-entry in the lessor for condition broken. As stated by the author in Kent's Commentaries, Lacy's Ed., page 132-133, in discussing conditions and limitations:

> "Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction, depending on the contract. The intention of the party to the instrument, when clearly ascertained is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument (b). The distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect will after all depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case."

This statement of the Court of Appeals is fully supported by the authorities and may we again call the Court's attention to the case of *Bowman* v. *Foot, supra,* cited here at page 17. In this case, the Supreme Court of Connecticut said in effect that a provision such as paragraph 3 of Atwell's lease is now universally taken to be for the advantage of the landlord. "Void" means "voidable at his election" and "Expire and terminate" being also an elliptical phrase, means "Expire and terminate at lessor's option" and that in the case of a breach of a condition in a lease for years, an entry or claim to divest the lessee's

estate is required as the lease is to expire and terminate only at lessor's option and accordingly if lessor chooses he may waive it.

The Court further said at page 339:

> "If a tenant's right is thus voidable only, the option to avoid must be exercised under the contract and according to legal usage. The re-entry clause at all events creates a necessity for some positive act of the landlord to determine his tenant's estate."
>
> • • • • •
>
> "Where a lease is thus voidable, the landlord's option to avoid it should be exercised at the proper point of time and in the proper place; and above all, should be brought home to the tenant's knowledge through some unequivocal act, in order to certify to him that he is absolved from the further performance of a lessee's duties."

Citing cases: *Fifty Associates* v. *Howland,* 11 Met. 99; *Bishop* v. *Trustees of Bedford Charity,* 28 L. Jour. 215; which was afterwards reviewed in the Exchequer Chamber.

The Court's holding is stated at page 337:

> "High authority sanctions the idea that the acceptance of rent accruing after condition broken, is in law a waiver of the forfeiture, and not evidence of such waiver merely. It has also been said by judges of great eminence, that the right of the party who pays money to control its application, constrains the lessor who receives rent, tendered as such, to waive his claim of forfeiture.
>
> "The only point which we propose to settle as the law of the present case is, that, upon the facts stated, there was no legal determination of the lessee's estate."

For the purpose of our case, it should be sufficient to say that the provision was included for Atwell's benefit and its

alone, and as the Court of Appeals said, Atwell had the right to do one of two things—stand on the breach and treat the lease as terminated, or ignore the breach and acknowledge the continued existence of the lease. Having done the latter, as the Court found upon substantial evidence, Atwell is bound by its course of conduct. As we have seen by numerous cases cited by us, the lease, upon the happening of Sound's bankruptcy, was not rendered *ipso facto* void, but voidable only at Atwell's option or election.

The condition under the facts as established by the evidence, by reason of Atwell's subsequent conduct in billing Sound for rent and accepting payments as rent, was dispensed with and Atwell cannot now be heard to say that the lease was terminated upon Sound's bankruptcy. Counsel for Atwell have failed to show why as sole owner of the right of re-entry for condition broken Atwell could not waive the breach. There is no answer. It is a simple matter of contract law, and which the Court of Appeals in the *Schneider* case, *supra,* cited herein at page 12 applies to leases as well as other contracts.

None of the cases cited by counsel for Atwell are in point because the question of waiver was not involved in any of them.

On oral argument before the Circuit Court of Appeals, counsel for Atwell relied upon the case of *Jandrew* v. *Bouche,* 29 Fed. (2d) 346, to support his contention that Atwell's lease with Sound terminated upon Sound's bankruptcy and that the provision could not be waived by Atwell, but as the Court of Appeals points out in its opinion (R. 111), that case is not controlling because the question of waiver was not involved. That case turned entirely upon construction of the lease, whereas, here, our case turns upon the conduct and intention of Atwell with reference to the lease after knowledge of the breach and the court

said that the *Jandrew* case does not hold that a conditional limitation when applied to a lease for a term of years, may not be waived by lessor upon breach of condition.

In the *Jandrew* case, lessee was adjudicated a bankrupt on January 16, 1928, and on January 27, a Trustee was elected. On January 30, 1928, the Trustee sold the entire assets of the bankrupt on the leased premises and turned same over to the purchaser together with the keys of the store, telling the purchaser that he had no interest in the lease and that the purchaser would have to make arrangements with the landlord if he desired to continue to occupy the premises. The lessor refused to deal with the occupant of the building and filed her proof of claim in the bankruptcy proceeding. Thus the court will readily see that there was no continued occupancy by lessee after their bankruptcy and no payment or acceptance of rent by lessor, whereas, in our case, Atwell has received payment of rent each month from the time of Sound's bankruptcy to the present time without objection or protest.

Counsel also cites the cases of *Irving Trust Co., as Trustee* v. *A. W. Perry, Inc.*, 293 U. S. 307, 311; 79 L. Ed. 379, 382. An examination of this case discloses that it was not an action for possession and the question of waiver was not involved. Quite the contrary, the case involved the right of a lessor to file and have allowed a proof of claim in lessee's bankruptcy proceeding for future rent equal to the difference between the present fair value of the remaining rent due under the lease and the present fair rental value of the premises for the balance of the term. Apparently after lessee's bankruptcy occurred, lessor, not receiving rent, with vacant premises on its hands, had no other course to follow than to file a claim in the bankruptcy proceeding, which the court justly allowed.

Likewise, an examination of *Finn* v. *Meighan*, 325 U. S.

300, discloses that the question of waiver was not involved or raised. This clearly appears from the opinion of this Court and the Circuit Court of Appeals (146 Fed. 2nd 594).

Murray Realty Co. v. *Regal Shoe Co.*, 193 N. E. 164 (N. Y.) page 165 was also a suit for rent and again we see that the question of waiver was not involved and the decision is not binding on this Court.

And in the case of *Model Dairy, Inc.* v. *Foltis-Fischer* (Second Circuit), 67 Fed. (2d) 704. A study of this case discloses that payments were consistently made for use and occupation and not as rent and the court very properly points out the distinction which we have cited in our brief and again quote from page 706:

> "* * * If the lessor elects not to re-enter his decision is final; it will be inferred from the receipt of rent accruing after the breach, or from any other recognition of the continuance of the term. *Greene's* case, 1 Leonard, 262; *Green's* case, Croke's Eliz. 3; *Pennant's* case, 3 Coke, 64 (b); *Goodright* v. *Davids*, 2 Cowp. 803; *Roe* v. *Harrison*, 2 Term Rep. 425; Courts have been at times astute to find that the lessor has so elected."

And again *In Re Walker* (also Second Circuit), 93 Fed. (2) 281, the payments were not designated either as rent or for use and occupation and the court stated that the burden was on the Debtor to establish that the payments were made as rent and in this regard it failed, but the court did recognize as we have pointed out that if the payments had been made as rent, it would have tolled the lessor's re-entry. Thus the cases clearly analyzed sustain our contention that if the payments are actually made as rent the lessor's right of re-entry is thereby tolled.

Conclusion.

Based upon all the facts and circumstances of this case and in recognition of equitable principles, it is submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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